Supreme Court, U.S.
FILED

97 1098 DEC 24 1997

OFFICE OF THE CLERK

(1)

No. _____

In The
Supreme Court of The United States
October Term 1997

MICHAEL R. DANCY,
Petitioner,

v.

HYSTER COMPANY,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

*BILL R. HOLLOWAY
Attorney at Law
P. O. Box 1069
McGehee, AR 71954
(870) 222-6356

JOHN P. LEWIS
John P. Lewis, P.A.
320 Ouachita Avenue
Hot Springs, AR 71901
(501) 321-1009

Attorneys for Petitioner
**Counsel of Record*

APPELLATE ADVANTAGE
3723 N. OAK TRAFFICWAY◆KANSAS CITY, MO 64116◆816-453-2424

55 pp

QUESTION PRESENTED FOR REVIEW

Should the analysis for determining whether expert testimony should be admitted or excluded under Fed. R. of Evid. 702 mandated by this Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1992), be restricted to scientific testimony?

LIST OF ALL PARTIES

Michael R. Dancy

Hyster Company

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of All Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reason for Granting the Writ:	
The lower courts erred in applying the Daubert analysis to merely technical testimony because the relevant factors outlined in Daubert are not feasible when applied to this kind of testimony	5
Conclusion	8

APPENDIX

Appendix A
Order of the United States Court of Appeals
for the Eighth Circuit,
Filed September 25, 1997 ..... Apdx A-1

Appendix B
Order of the United States District Court for
the Eastern District of Arkansas, Pine Bluff Division,
Filed November 27, 1996 ..... Apdx B-16
Memorandum Opinion and Order of the
United States District Court for the Eastern District
of Arkansas, Pine Bluff Division,
Filed December 11, 1996 ..... Apdx B-28

TABLE OF CITATIONS

Page

Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1383 (4th Cir. 1995) 5

Compton v. Subaru of America, Inc., 82 F.3d 1513, 1518 (10th Cir. 1996) 5

Cummins v. Lyle Industries, 93 F.3d 362, 368-69 (7th Cir. 1996) 5

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S.579 (1993) ..... i, 5

Freeman v. Case Corp., 924 F. Supp. 1466 (W.D. Va. 1996) 6

Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 296 (8th Cir. 1996) 5

Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384 (8th Cir. 1995) 5

U.S. v. Rinecon, 28 F.3d 921, 923 n.3 (9th Cir. 1994) 5

Statutes Cited:

28 U.S.C. §1254(1) 1

Rules Cited:

Federal Rules of Evidence:

Rule 702 ..... 1, 8

Petitioner Michael R. Dancy prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit which affirmed orders granting respondent's motions in limine and motion for summary judgment.

OPINIONS BELOW

The Order of the Eighth Circuit upholding the District Court's Order of Summary Judgment and granting the respondent's motion in limine appear at Appendix A, *infra*. The Orders and Opinions of the United States District Court for the Eastern District of Arkansas appear as Appendix B.

STATEMENT OF JURISDICTION

The Opinion of the Eighth Circuit was filed on September 25, 1997. The Petition for Certiorari was filed with the Court no later than ninety days from the date of the Order of the Eighth Circuit. Jurisdiction over this Petition is conferred on the Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Evid. 702.

STATEMENT OF THE CASE

Petitioner, Michael R. Dancy, had been working for his employer, Union Camp, for approximately four months prior to the time of his accident. Before operating the lift truck, Dancy received the necessary training. The accident occurred on the morning of July 7, 1994, as Dancy began to raise a load of paper. The lift truck began to tilt forward and immediately proceeded to fall to the right. Upon the realization that the lift truck was tilting forward, Dancy followed the instructions set forth in the safety manual provided with the lift truck by grabbing the steering wheel and pressing his legs down against the floor of the lift truck. However, as the lift truck was falling, Dancy's legs were ejected from the operator's compartment, causing his foot to be pinned underneath the right front roll bar of the lift truck and resulting in injury to his leg to the extent that it was later amputated just below the knee. Although there were no witnesses to the accident, the sound caused by the falling lift truck and Dancy's cries for help immediately summoned his co-workers to the scene of the accident.

The lift truck manufactured by Hyster Company is utilized for the purpose of lifting heavy objects by pushing a structure under the object to be moved and then raising it by hydraulics or other means. These machines lift heavy objects far above their height. The lift truck actually lifts objects

anywhere from four to six feet above the maximum level of a forklift, thus making it susceptible to tip over. Hyster Company had notice of the machines' propensity to tip over due to the nature of their use and prior tip over occurrences. This particular lift truck turned over when lifting a load, causing Dancy's foot to be pinned underneath the right front roll bar of the lift truck and resulting in injury to his leg to the extent that it was later amputated just below the knee.

Due to the nature of its use, Petitioner contends that the lift truck should have contained a guard to keep the driver and his appendages within the operator's compartment in the event of a tip over. Hyster Company had been previously put on notice that similar accidents have occurred where the lift truck had tipped over laterally causing injury to the operator. Although a preventive maintenance check was performed on the lift truck the morning of the accident, it was neither designed to nor effective in discovering defects in the design of the lift truck. Petitioner filed a complaint on September 19, 1995, alleging that Hyster Company's failure to install a guard on the lower right panel of the operator's compartment was the proximate cause of the Plaintiff's injuries. Dancy alleged that Hyster Company was either negligent in designing the lift truck or that its design was so defective that it made the lift truck unreasonably dangerous.

The Plaintiff retained Dr. Richard E. Forbes, a

mechanical engineer, to serve as an expert in this matter in February of 1996. Based upon a combination of Dr. Forbes' education, professional experience and training, he rendered an opinion that the lift truck was defective because it did not have a guard to prevent the driver and his appendages from exiting the operator's compartment in the event of a tip over. At his deposition, Dr. Forbes testified that the lift loader was defective in that it failed to have a guard or a similar protective device on the lower right side of the lift truck. Dr. Forbes also testified that a guard or similar protective device could have been installed on the lower right side of the lift truck without affecting the utility of use of the machine or without making any significant impact on its costs. Dr. Forbes further testified that the safety measures he proposed have been adopted by manufacturers of similar machines and such precautions had been implemented without detracting from overall efficiency and cost.

Subsequently, Hyster Company filed a motion in limine, alleging that Dr. Forbes' testimony should be excluded at trial based upon the analysis outlined in Daubert v. Merrell Dowll Pharmaceuticals, Inc., 509 U.S. 579 (1993). On November 27, 1996, the United States Court of Appeals for the Eighth Circuit affirmed the United States District Court for the Eastern District of Arkansas granted Hyster's motion in limine. On December 11, 1996, the District Court granted Defendant's separate motion for summary judgment, stating

that Dancy could not present a submissible products liability claim for either negligence or strict liability without expert testimony.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURTS ERRED IN APPLYING THE DAUBERT ANALYSIS TO MERELY TECHNICAL TESTIMONY BECAUSE THE RELEVANT FACTORS OUTLINED IN DAUBERT ARE NOT FEASIBLE WHEN APPLIED TO MECHANICAL ENGINEERING PRINCIPALS.

This Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), has revolutionized the field of product liability cases. In essence, this Court has required the United States District Courts to act as the "gatekeeper" for the allowance of expert testimony in a product liability case, reviewed by the appellate courts on an abuse of discretion standard.

Several of the circuits are split regarding their interpretation of Daubert. Some courts have mandated that the Daubert analysis apply to all expert testimony. Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 296 (8th Cir. 1996); Cummins v. Lyle Industries, 93 F.3d 362, 368-69 (7th Cir. 1996);and Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384 (8th Cir. 1995). Other circuits that have considered this issue have applied Daubert to strictly scientific testimony. See Compton v. Subaru of America, Inc., 82 F.3d 1513, 1518 (10th Cir. 1996); Benedi v. McNeil-P.P.C., Inc., 66 F.3d

1378, 1383 (4th Cir. 1995); U.S. v. Rinecon, 28 F.3d 921, 923 n.3 (9th Cir. 1994); Freeman v. Case Corp., 924 F. Supp. 1466 (W.D. Va. 1996).

This Court in Daubert clearly stated that its decision was "limited to the scientific context because that is the nature of the expertise offered here." See Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579, 590 n.8 (1993). Some circuits have recognized that the Daubert analysis should not be extended to merely technical testimony because the relevant factors to consider are not feasible when, for example, the court applies them to mechanical engineering principals.

The absurdity of applying the Daubert factors is readily apparent in this case. The first factor which Daubert requires is to test the hypothesis. In this case, in order for the Petitioner to test the hypothesis, he would be required to purchase a lift truck, construct an expanded metal cage around the operator's compartment, and perform destructive testing.

Certainly, the purchase of expensive equipment (in this instance, a lift truck) is cost prohibitive and should not be required, particularly when the engineering design defect is so readily apparent. Applying Daubert to the facts in this case requires the Petitioner to become the design engineer to construct a feasible guard. Petitioner's allegation is that the

lift truck, in its present state, is defective and unreasonably dangerous in the event of a tip over. Yet in order for the Petitioner to stay in Court, he must, in essence, become a design engineer for the manufacturer. Certainly, Daubert was not intended to be applied in this manner.

The next factor in the Daubert analysis requires the Petitioner to ensure that the theory has been subjected to peer review and publication. In this instance, the peers would be the manufacturers of lift trucks. It is unlikely that the manufacturers will either authorize or conduct any studies of reviews of guards placed on their equipment without litigation. Thus, Petitioner is placed in the proverbial "catch twenty-two". Assuming that Petitioner could afford to purchase the lift truck, construct a feasible guard, and place it on the lift truck, he would still be unable to offer this evidence at trial for failure of any peer review of the guard. Thus, Daubert's application to these facts effectively precludes any products liability action because of the cost and time constraints of litigation.

The third factor to be considered under the Daubert analysis is the potential rate of error of the proffered theory. Here, it is apparent that if a guard was on the lift truck such as the one proposed by Dr. Forbes, the rate of error would have been minimal at best. Common sense dictates that if a guard or cage had been on the lift truck, Petitioner's injuries to his

leg would not have occurred because his legs would not have been outside the operator's compartment.

Finally, Daubert requires that the Court consider whether the theory or methodology has been generally accepted in the community. In this case, Petitioner concedes that guards have not been accepted in the industry by manufacturers of lift trucks. However, guards have been accepted within the broader community of lift equipment, because guards are on bobcats, fork lifts, and New Hollands. Certainly, operators of lift trucks deserve equally safe protection in the event of a tip over.

The facts are clear that if this lift truck had been equipped with a cage or guards around the operator's compartment, it would have prevented the operator or his arms or legs fro being thrown outside the operator's compartment. Thus, the injury leading to the amputation of his leg would not have occurred. Therefore, based on the undisputed facts, the expert's testimony is not a theory or hypothesis but based on fact. As such, his testimony is distinguishable from the requirements of Daubert which by its own words applies to scientific theories and hypothesis. Yet, the circuit courts are applying Daubert factors to all proffered expert testimony.

CONCLUSION

As outlined above, application of the Daubert factors to mechanical engineering theories is impractical and overly prohibitive. It is ironic that the intent of this Court in Daubert was to expand Rule 702 of the Federal Rules of Evidence. Yet, several circuit courts have interpreted Daubert to restrict expert testimony in all product liability cases. Petitioner submits that the intent of this Court was to restrict the Daubert analysis to scientific evidence. As stated earlier, many circuits which have considered this issue have limited Daubert in this manner. For these reasons, Petitioner respectfully requests that this Court grant the Writ and clarify its ruling in Daubert to restrict its analysis to scientific evidence.

Respectfully Submitted,

BILL R. HOLLOWAY
Counsel of Record
P.O. Box 1069
McGehee, AR 71954
(870)222-6356
and
JOHN P. LEWIS
JOHN P. LEWIS, P.A.
320 Ouachita Ave., Ste.203
Hot Springs, AR 71901
(501) 321-1009

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OPINION
SEPTEMBER 25, 1997
PAGE 1

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 97-1042

Michael R. Dancy,	*	
	*	
Appellant,	*	
	*	Appeal from the
	*	United States
v.	*	District Court for the
	*	Eastern District
	*	of Arkansas.
Hyster Company,	*	
	*	
Appellee.	*	

Submitted: June 12, 1997
Filed: September 25, 1997

Before BOWMAN, FLOYD R. GIBSON, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

FLOYD R. GIBSON, Circuit Judge.

Michael Dancy ("Dancy") appeals the District Court's[1] exclusion of his expert witness. Dancy also appeals the grant of summary judgment in favor of Hyster Company ("Hyster"). We affirm.

I. BACKGROUND

Dancy began working for Union Camp Corporation in the Spring of 1994 and was trained to operate a "lift truck." A lift truck is a machine similar in appearance to a forklift. Its appearance differs in that, instead of having a "fork" in front of the machine to raise and lower heavy objects, a lift truck has a large clamp that encircles and grips large objects. In this case, Dancy used the lift truck to lift large cylindrical rolls of paper. On July 7, 1994, Dancy lifted two rolls of paper with the goal of placing them on top of two other rolls stacked on the floor. He accomplished this by lifting the bottom of two rolls that were stacked on top of each other, thereby lifting both rolls simultaneously. See Jt. App. at 205.[2]

---

[1]The HONORABLE HENRY J. WOODS, United States District Judge for the Eastern District of Arkansas.

[2]The lift truck was capable of safely lifting 3,450 pounds. There is a dispute in the record as to whether the combined weight of the two rolls was 2,400 pounds or 4,238 pounds. Like the District Court, we are inclined to believe the latter figure; but,

The lift truck overturned, pinning Dancy's right foot under the lift truck. Dancy's right leg had to be amputated just below the knee.

Dancy filed suit against the lift truck's manufacturer, Hyster, alleging that the lift truck was defective because it did not have a cage or guard around the compartment to prevent the operator from being pinned under the lift truck. He also alleged that Hyster was negligent for failing to place a cage or guard around the operator's compartment. Dancy designated Dr. Richard Forbes as his sole expert witness. The District Court granted Hyster's motion to strike this designation in light of Daubert v. Merrell Dow Pharmaceutical, Inc., 113 S. Ct. 2786 (1993). The District Court then granted Hyster summary judgment, concluding Dancy could not prevail in this case without an expert witness. Dancy has appealed both rulings.

II. DISCUSSION

A. The Expert Witness

Dr. Forbes is a mechanical engineer and a professor at the University of Mississippi and was retained by Dancy in 1996. He has never designed a forklift, a lift truck, or any other

---

again like the District Court, we decline to reach this issue because it is not necessary to the issues at hand.

similar machine; his specialty is in the field of thermal science. At his deposition, Dr. Forbes theorized that the lift truck should have had a guard to keep Dancy's leg within the lift truck's frame. Dr. Forbes had not tested this theory in any way, had not seen this type of device on a forklift or any other similar machine, and had not even designed the device he suggested would have prevented Plaintiff's injury. See Jt. App. at 125-27; 130. Approximately one month after his deposition, Dr. Forbes provided a supplemental report wherein he stated:

> It is my opinion that a permanently-located open-mesh guard on the right side of the lift would have prevented Dancy's injury. The guard would be located so as to reduce the probability that the operator's legs would leave the interior of the overhead guard during tipover. . . . I am confident that such guards can be designed which will not affect the utility of the lift truck and which will not add any significant cost to the machines.

Jt. App. at 19. This wording suggests that Dr. Forbes still had not designed or tested the proposed safety device.

"Decisions concerning the admission of expert testimony lie within the broad discretion of the trial court, and these decisions will not be disturbed on appeal absent an abuse of

discretion." Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 296 (8th Cir. 1996). The starting point for analyzing expert testimony is Federal Rule of Evidence 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under Daubert, district courts are to perform a "gatekeeping" function and insure that proffered expert testimony is both relevant and reliable. See Penney v. Praxair, Inc., 116 F.3d 330, 333 (8th Cir. 1997); Peitzmeier, 97 F.3d at 296-97; Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384 (8th Cir. 1995). "Daubert suggests that a trial court, when assessing the reliability of expert testimony, consider (1) whether the concept has been tested, (2) whether the concept has been subject to peer review, (3) what the known rate of error is, and (4) whether the concept is generally accepted by the community." Pestel, 64 F.3d at 384. The District Court considered these factors in this case and

concluded that Dr. Forbes's theory could be, but had not been, tested. In fact, Dr. Forbes had not even attempted to design the device he was suggesting was necessary to prevent the lift truck from being defective. Although he opined that the device he envisioned would work, he had no basis for reaching this conclusion. In fact, it appears that Dr. Forbes's views were being altered and refined based on questions raised during the deposition.[3]

---

[3]For instance, Dr. Forbes testfied:

> I'll probably do some thinking about a design after today, ... Again, I'm talking about some kind of mesh, some kind of thing you'd see commonly around here on highway brushhogs to protect the operator from throwing objects mainly but doesn't significantly obstruct the view of the things that [the operator] need[s] to see.

Jt. App. at 135. This demonstrates that (1) Dr. Forbes had not seriously considered a particular design and, more importantly, (2) Dr. Forbes had not seriously considered the effect his envisioned safety device would have on the effective and safe operation of the lift truck.

Although Dr. Forbes seemed to have addressed these concerns in his supplemental report, careful reading reveals that Dr. Forbes simply expressed his confidence that an effective device could be created without interfering with the operation of a lift truck; in short, he simply "assumed away" any problems.

Dancy attempts to avoid the effects of Daubert by contending that it does not apply unless the expert's testimony will rely on scientific principles or methods. We have expressly rejected this argument. See Peitzmeier, 97 F.3d at 297. Dancy also contends that Dr. Forbes's testimony should have been admitted based on his explanation that a device similar to the one he envisioned had been used on bobcats and front-end loaders. The District Court concluded that there are significant differences between these two pieces of lifting equipment and lift trucks: differences that prevent the automatic assumption that what works on one will work on another. Dancy has presented no argument demonstrating the District Court's conclusion in this regard was incorrect, and our review of the record reveals no basis for reaching a different conclusion.

We conclude that the District Court was justified in questioning the reliability and usefulness of Dr. Forbes's testimony. Disallowing his testimony did not constitute an abuse of discretion.

B. Summary Judgment

We review the District Court's grant of summary judgment de novo, applying the same standard as applied by the District Court. A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see generally Williams v. City of St. Louis, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992). In applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. See Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Tyler v. Harper, 744 F.2d 653, 655 (8th Cir. 1984), cert. denied, 470 U.S. 1057 (1985). However, a party opposing a motion for

summary judgment "may not rest upon the mere allegations or denials of the . . . pleading[s], but . . . by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The District Court concluded that, without the aid of expert testimony, there was no evidence demonstrating (1) the existence of a defect in the product or (2) negligence by Hyster. We consider these issues separately, keeping in mind that Arkansas law controls the substance of these two causes of action.

1. Strict Liability

"Generally speaking, there are three varieties of product defects: manufacturing defects, design defects, and inadequate warnings." West v. Searle & Co., 806 S.W.2d 608, 610 (Ark. 1991). Plaintiff has alleged a cause of action based on the existence of a design defect and, faced with the unavailability of expert testimony, contends that expert testimony was not needed to establish the existence of a defect.

Arkansas law does not require expert testimony in all product liability cases. "Strictly speaking, since proof of

negligence is not an issue, res ipsa loquitur has no application to strict liability; but the inferences which are the core of the doctrine remain, and are no less applicable." Higgins v. General Motors Corp., 699 S.W.2d 741, 743 (Ark. 1985). Consequently, "[p]roof of a specific defect is not required when common experience teaches the accident would not have occurred in the absence of a defect." Id.; see also Lakeview Country Club, Inc. v. Superior Products, 926 S.W.2d 428, 431 (Ark. 1996); Williams v. Smart Chevrolet Co., 730 S.W.2d 479, 482 (Ark. 1987). However, "[t]he mere fact of an accident, standing alone, does not make out a case that the product is defective." Higgins, 699 S.W.2d at 743. Consideration of this issue also requires examination of the extent to which the plaintiff has negated other possible causes for the accident. See Williams, 730 S.W.2d at 482-83; Higgins, 699 S.W.2d at 743.

Initially, we note that this *res ipsa loquitur*-like doctrine is ill-suited to cases involving defective design for failure to include a safety device. Higgins, Lakeview, and Williams all involved products that did not work in the manner intended; that is, they involved manufacturing defects. Higgins involved a car that accelerated without warning, Lakeview

involved paint that peeled, and Williams involved a car door that unexpectedly opened while the car was moving. In this case, Plaintiff does not contend that the lift truck malfunctioned in any way; he contends the lift truck was not designed properly because it lacked a safety device. Lay jurors would tend to understand products that do not work; they are not likely to possess "common understanding" about how products are designed. We cannot expect lay jurors to possess understanding about whether the mesh guard envisioned by Dr. Forbes would be capable of withstanding the force involved in a fall and be effective in protecting Plaintiff from the injury he received. We cannot expect a lay juror to know whether such a device would increase the risk associated with the vision impairment discussed by Dr. Forbes. We cannot expect a lay juror to know whether the mesh guard itself would cause more injuries than it creates by, for instance, breaking and puncturing the lift truck's operator.[4] Although Dancy does not have the burden of

---

[4]These points cannot be dismissed as mere speculation on the Court's part; indeed, to do so demonstrates the hazard involved. These are matters the jury is required by law to consider in determining whether a defect exists, and without evidence on the point the jury would be doing nothing more than speculating --

proving that his "alternative safer design was available and feasible in terms of cost, practicality and technological possibility," French v. Grove Mfg. Co., 656 F.2d 295, 297 (8th Cir. 1981), he still has the burden of proving the existence of a defect by showing that a safer alternative design actually exists. He cannot carry this burden without proving that his proposed design will actually work, and we believe the answer to this question is beyond the ken of lay jurors.

Dancy has also failed to negate other causes for his injuries. A jury may believe his testimony that the combined weight of the two rolls did not exceed the lift-truck's specifications. However, there is also evidence that it was not safe to be lifting two rolls of any weight in the manner in which Dancy was lifting the two rolls in July 1994. Nothing in the record negates this as a cause of Dancy's injuries.

We also find support for our conclusion in the outcomes of the three Arkansas Supreme Court decisions referenced above. In Higgins, the court declared that it "could not say that when a car moves suddenly, even swiftly, into an

---

which, of course, cannot be allowed.

intersection common experience tells us it would not have happened absent a defect" and went on to conclude that the plaintiff failed to "adequately negate[] any cause of the accident due to driver error or control." 699 S.W.2d at 743. In Williams, the court declared that it could not hold "that when a car door suddenly flies open while the car is traveling on a gravel road at 10 miles per hour common experience tells us that it could not have happened absent a defect." 730 S.W.2d at 483. The court further held that the plaintiff failed to negate causation due to driver error, even though she testified "she is positive she shut and locked the door and that she was driving slowly and the road was straight." Id. Finally, in Lakeview, the Arkansas Supreme Court agreed with the trial court that there were numerous reasons why paint would peel, including "misuse and improper application." 926 S.W.2d at 431. After requiring expert testimony in these cases, it seems obvious that the Arkansas Supreme Court would require expert testimony in this case.

2. Negligence

Negligence requires proof that an ordinarily prudent person in the same situation will foresee an appreciable risk of harm to others, causing him or her to act in a more careful manner. E.g., Mason v. Jackson, 914 S.W.2d 728, 730 (Ark. 1996). Much of what we said with respect to Dancy's product liability claim applies to his negligence claim: absent expert testimony, there is no basis for the jury to evaluate the actions of an ordinarily prudent person in the same situation as Hyster. Cf. Skinner v. R.J. Griffin & Co., 855 S.W.2d 913, 915 (Ark. 1993).[5] Our conclusion is buttressed by the lack of

---

[5] The pertinent quote from Skinner involved Defendant's arguments regarding comparative fault:

> [T]he defendant asks us to hold that . . . "[i]t takes no expert to demonstrate that any decent protective eyewear would have prevented the string from striking appellant's eye, in which event, no such injury could have possibly occurred." We cannot so hold because here the jury had no basis, except for pure guesswork, to find that safety goggles would have totally prevented the injury or to what degree they would have reduced the injury. . . . Further, assuming goggles were available and practical to wear, the proof did not show whether they would have prevented the string or the stake from entering from the side of the glasses; what the tensile

any evidence suggesting Hyster's lift trucks had a history of or propensity toward tipping over and causing injuries similar to those sustained by Dancy.

III. CONCLUSION

For the foregoing reasons, the District Court's order barring Dr. Forbes's testimony and its subsequent entry of summary judgment in favor of Hyster Company is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

strength of such glasses was; whether the whipping force of the string and stake, if coming from the front, would have broken or shattered the glasses; to what extent, if any, the glasses would have reduced or eliminated the injury if they had only slowed the string whipping from the side; or to what extent, if any, the glasses would have reduced the injury if they had not shattered or broken if the force was from the front. Thus, a causal connection between the failure to wear some unspecified type of goggles and the injury to plaintiff's eye was not established beyond mere conjecture and speculation.

855 S.W.2d at 915. This conclusion is reinforced by the fact that there is no evidence in the record that Hyster's lift trucks had a history of or propensity toward overturning and pinning their operators beneath them. In this case, there is no evidence in the record that will permit the jury to do anything other than speculate in the manner described and prohibited in Skinner.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

ORDER
NOVEMBER 27, 1996
PAGE 16

MEMORANDUM OPINION AND ORDER
DECEMBER 11, 1996
PAGE 28

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

MICHAEL R. DANCY

PLAINTIFF

V. NO. PB-C-95-489

HYSTER COMPANY

DEFENDANT

LIBERTY MUTUAL INSURANCE COMPANY

INTERVENOR

ORDER

Defendant Hyster Company ("Hyster") has submitted a motion in limine.[6] In this motion, Hyster ask the Court to bar Dr. Richard E. Forbes ("Forbes") from testifying as an expert at the trial of this case. The deposition of Hyster's motion follows.

---

[6]Hyster has also filed a motion for summary judgment.

It is agreed that plaintiff, Michael R. Dancy, was operating a lift truck ("truck") designed and manufactured by Hyster when the truck overturned and pinned his right foot under the right part of the truck. His right foot, and the part of his right leg below his knee, were subsequently amputated.

Plaintiff provided the Court with the following summary of his claims and relief in a pre-trial conference information sheet filed on November 18, 1996:

> The lift truck did not have a cage or guards around the operators compartment which would prevent the operator of said truck from being tossed from the truck or his appendages being tossed outside the protective roll cage of the lift truck. Even though the plaintiff had his seatbelt on at the time of the accident, his right foot extended beyond the operators compartment of the lift truck when it overturned, . . .
>
> Plaintiff seeks damages for negligence and strict liability as a result of defendant manufacturer, Hyster's failure to adequately guard and protect the operator of this particular lift truck from injury.

See Pleading 40 at 1-2.

Hyster maintains in this motion that "Forbes is not qualified by education or experience or training to testify about the design of the lift truck that was involved in this accident or the alleged existence of a defect." See Brief at 1. It is therefore Hyster's position that Forbes cannot satisfy the preliminary assessment the Court is required to make by the seminal Supreme Court decision in Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993). Hyster specifically alleges the following:

> 8. Plaintiff first retained Dr. Forbes to serve as an expert in this matter in 1996. Plaintiff has identified Dr. Forbes as his only expert in this case. Dr. Forbes is a mechanical engineer on the staff in the Mechanical engineering Department at Mississippi State University. Dr. Forbes' specialty is in the area of thermal sciences, particularly heat transfer and fluid mechanics. Dr. Forbes has never designed a forklift or any of its components, has not published anything relating to forklifts. In fact, there is no aspect of his experience, other than his general mechanical engineering background, which he contends has anything to do with forklifts. . . .

> 9. Dr. Forbes' deposition was taken on August 26, 1996. [Footnote omitted]. During that deposition Dr. Forbes testified that the defect which he now contends was present was the absence of a guard or similar protective device on the lower right side of the lift truck. As of that date, Dr. Forbes had not designed a guard of the type he contends should have been present on the lift truck, and had not conducted testes or studies to determine whether or not the proposed guard was feasible or would be effective.
>
> 10. Sometime after his deposition was taken Dr. Forbes evidently did additional work. On September 25, 1996, plaintiff's counsel produced Dr. Forbes' "supplemental report." . . . The supplemental report confirms that Dr. Forbes has still not actually designed or tested a guard of the type to which he is referring.

See Brief at 3-4.

Plaintiff understandably opposes Hyster's motion and does so on numerous grounds. First, Fed R. Evid. 702 permits any witness qualified as a expert by knowledge, skill, experience, training, or education to testify in the form of an opinion or otherwise if his scientific, technical, or other specialized knowledge will assist the trier of fact to

understand the evidence or to determine a fact in issue. Because of Forbes' education, experience, and training,[7] plaintiff maintains that Forbes qualifies as an expert under this rule. Second, because Forbes is relying upon general engineering principles and concepts, the Court should not utilize the analysis promulgated by the Supreme Court in Daubert. Plaintiff takes the position that the design defect in this case is a "straightforward analysis." See Brief at 9. "Simply put, Dr. Forbes contends that the lift truck should have contained a guard to keep the driver and his appendages within the operator compartment of the lift truck. Dr. Forbes' analysis is not based upon any unique methodology or principle." See Brief at 9. Third, assuming that the Court uses the Daubert analysis, plaintiff maintains that Forbes' testimony satisfies that analysis. The following excerpt from the plaintiff's brief demonstrates why he holds that belief:

---

[7]"Dr. Forbes has given testimony in other cases involving lift truck accidents. . . . [He] is currently teaching courses when design of equipment is a part of the curriculum, as he has done in the past. . . . [He] has gained experience and knowledge in the design and testing of guarding equipment through litigation related work and work for insurance companies over the years. . . . [He] has also taught a course in agricultural engineering as well. . . . [He] has rendered opinions in the design of comparable equipment in other proceedings. . . . [He] has a masters degree as well as a Ph.D. in mechanical engineering from Mississippi State University. He is currently a professor of mechanical engineering at Mississippi University." See Brief at 3-4.

Daubert suggests that the court should consider whether the concept has been tested. The plaintiff submits that the concept suggested by Plaintiff's expert has been tested. The Plaintiff submitted evidence that the identical guard has been placed on similar equipment such as front-ed lifters and bobcats. the Plaintiff submitted pictures of this guard on similar equipment.

The Plaintiff's expert submitted evidence of peer review of accidents of this nature and the rate of error or injury resulting from such accidents. Obviously, the concept has been accepted by the community as similar equipment manufacturers have adopted the safety measure which Plaintiff's expert recommended.

Defendant suggest that no other manufacturer of a lift truck has adopted such a safety measure. However, Defendant is one of the primary manufacturers of lift trucks. Although other manufacturers construct similar equipment with guards such as front-end loaders and bobcats, Defendant is one of a select number of companies who manufacture lift trucks.

> Significantly, manufacturers of front-end lifters and bobcats have adopted the safety measures suggested by Dr. Forbes. Dr. Forbes' testimony regarding the design defect in this case is simple and straightforward. He states that the lift truck should have contained a guard to prevent the operator from falling underneath the machine in the case of tipover. He stated that this safety measure had been used in similar machines without loss of efficiency.

See Brief at 9-10.[8]

In light of the foregoing, should the Court bar Forbes from testifying as an expert at the trial of this case? The answer to that question is yes.[9]

As a preliminary matter, Hyster correctly notes that many of the cases cited by plaintiff are irrelevant because they pre-date Daubert. Although the case did not change the language of Fed. R. Evid. 702, it is a landmark case because the

---

[8]Hyster later filed a reply and a supplemental reply in which it addressed various grounds advanced in plaintiff's response.

[9]Plaintiff is correct when he notes that Forbes has not yet testified at a trial in this case. See Brief at 7. By that, the Court assumes plaintiff is contending that it is premature to bar Forbes from testifying. The Court, however, has the benefit of his deposition. Hopefully, his trial testimony would be substantially similar to his statements contained in the deposition.

Supreme Court changed the manner in which a court was to apply that rule. Specifically, the Supreme Court abandoned the "general acceptance" test of Frye v. U.S., 293 U.S. 1013 (D.C.Cir. 1923),[10] and adopted one requiring "an assessment" of the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'" See Gier v. Educational Service Unit No. 16, 66 F.3d 941, 943 (8th Cir. 1995) [quoting Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 592-92].

On a related matter, plaintiff alleges that because Forbes is relying upon general engineering principles and concepts, the Court should not utilize the analysis promulgated in Daubert. The Court of Appeals, however, considered and rejected the identical argument in Peitzmeier v. Hennessy Industries, Inc., 97 F.3d 293 (8th Cir. 1996), a case in which the Peitzmeiers attempted to offer expert testimony on the design of a tire changer.[11]

---

[10]Scientific evidence was admissible under Frye if the scientific principles underlying the evidence were sufficiently established to have gained general acceptance in the particular field in which they belong. See Frye v. United States, 293 F.2d at 1014.

[11]"As a threshold matter, the Peitzmeier argue that Daubert is inapplicable to [their expert's] testimony, contending that his opinions are founded on basic engineering principles, whereas Daubert applies only to novel scientific testimony. This argument fails, for our Court has not given Daubert so narrow a reading.

Thus, the disposition of this motion is governed by Daubert. That case makes clear that the Court is to act as a gatekeeper in screening the testimony of an expert witness for relevance and reliability. In fulfilling that role, the Court is obligated to consider, inter alia, the following factors:

> (1) whether the theory or technique "can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) whether the theory has been generally accepted.

See Id. at 297 [quoting Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. at 593-94].

Forbes' theory is that the truck should have contained a guard to keep plaintiff's leg inside the truck's framework. See Brief at 9. Plaintiff's application of the four Daubert factors to Forbes' theory depends entirely upon whether a lift is comparable to a front-end loader or bobcat. The Court adopts Hyster's explanation of the difference:

See, e.g., Gier v. Educational Serv. Unit No. 16, 66f.3d 940, 943-33 (8th Cir. 1995) (applying Daubert to psychological evaluations in cases of alleged child abuse); Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384 (8th Cir. 1995) (applying Daubert to testimony of mechanical engineer). We conclude that the Daubert analysis is properly applied to [the expert's proffered testimony." See Id.

> Clear evidence of the differences in these pieces of machinery is found within the classification of the machinery by the Society of Automotive Engineers (SAE). The SAE classifies lift trucks under a category entitled "Powered Industrial Trucks" while front-end loader[s] and bobcats are classified as "Earthmoving" or "General Purpose Industrial" machinery. (See SAE Categories of Off-Road Self-Propelled Work Machines -- SAE J1116 Jun86, . . .) The justification for differing classifications flows from the recognition that lift trucks are designed for a different purpose and working environment than are front-end loaders or bobcats. Safety features which are necessary on a front-end loader may not be necessary or practical for a lift truck. (John E. Johnson Affidavit, . . .) [Footnote omitted]. The difference between lift trucks and front-end loaders or bobcats were significant enough to warrant separate classification for regulatory purposes. These differences preclude Plaintiff's counsel from cavalierly equating the machinery for the purposes of supporting an allegation of a design defect.

See Brief at 8-9. Thus, whether a front-end loader or bobcat has the guard envisioned by Forbes is of no relevance to

whether such a guard should have been in place on this truck. The Court turns to consider the four Daubert factors.

The first factor requires the Court to inquire into whether Forbes' theory "can be (and has been) tested." The Court knows of no reason why his theory could not be tested. It does not appear, however, that it has ever been tested on a truck. In fact, Forbes has never even attempted to build the guard he proposes.

The second factor requires the Court to inquire into whether the theory has been subjected to peer review and publication. An examination of the pleadings does not disclose that the theory has been so subjected.

The third factor requires the Court to inquire into "the known or potential rate of error." Because Forbes' theory has never been tested, the known or potential rate of error cannot be determined.

The last factor requires the Court to inquire into whether the theory has been "generally accepted." Because the theory has never been tested, the Court does not know whether it has been accepted.

It gives the Court no great pleasure in concluding that Forbes is not qualified by education, experience or training to testify about the design of the truck in question or a defect it may have contained. He simply cannot satisfy the preliminary assessment the Court is required to make. Hyster's motion is granted, and Forbes is barred from testifying as an expert at the trial of this case.

The question becomes whether plaintiff can make a submissible case to the jury without Forbes' testimony. The Court has reviewed the parties various submissions, including the motion for summary judgment and plaintiff's response. That review convinces the Court that plaintiff cannot make a submissible case. Hyster's motion for summary judgment will therefore be granted in a separate order to be filed in the coming weeks. This case will be dismissed at that time.

IT IS SO ORDERED on this 22nd day of November, 1996.

/s/ Henry Woods
HENRY WOOD, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

MICHAEL R. DANCY

PLAINTIFF

V. NO. PB-C-95-489

HYSTER COMPANY

DEFENDANT

LIBERTY MUTUAL INSURANCE COMPANY

INTERVENOR

MEMORANDUM OPINION AND ORDER

INTRODUCTION. Defendant Hyster Company ("Hyster") has filed a motion for summary judgement.[12] Having examined the pleadings and exhibits submitted by the parties, the Court finds that the motion should be, and is, granted. Judgment will be entered for Hyster.

FACTS. The parties have filed separate statements of material facts as required by Local Rule c-10. Although some the "facts" outlined by the parties are actually conclusions, the Court adopts most of the representations set forth in the statements. The facts follow:

01. Hyster designs and manufacturers a vehicle referred to by the parties as a lift truck ("truck").[13]

02. I March of 1988, Hyster designed and manufactured a truck in compliance with the applicable federal regulations and delivered the truck to a Monticello, Arkansas, company, the Chase Bag Company ("Chase Bag"). See Hyster's Statement at 1-2.

---

[12]A motion for summary judgment should be granted if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving part is entitled to judgment as a matter of law. See Nelson v. City of McGehee, 876 F.2d 56 (8th Cir. 1989). Although the non-moving party receives the benefit of all favorable factual inferences, "[o]nly disputes over facts that may affect the outcome of the lawsuit under the governing substantive law will properly preclude the entry of summary judgment." Id.

[13]The vehicle has also been referred to as a forklift.

03. The truck was used by Chase Bag employees to lift and move heavy objects, in this instance, heavy rolls of paper; it did so by pushing a clamp "under the object to be moved and then raising [the object] by hydraulics or other means." See Hyster's Statement at 1 and Plaintiff's Statement at 1.

04. The truck was not fitted with a guard to "keep the driver and appendages within the operator's compartment in the event of a tip over." See Plaintiff's Statement at 2.

05. The "rated load capacity" of the truck was 3,450 pounds; the Court assumes that term of art means the truck was not designed to safely lift and transport more than 3,450 pounds. See Hyster's Statement at 4.

06. Chase Bag was later acquired by the Union Camp Corporation ("Union Cap"). See Hyster's Statement at 2.

07. In the Spring of 1994, plaintiff, Michael R. Dancy, began working for Union Camp and eventually received training to operate the truck. See Hyster's Statement at 2.

08. At approximately nine o'clock on the morning of July 7, 1994, a mechanic with Wrenn Handling, Inc., performed a preventive maintenance check on the truck. See Hyster's Statement at 2.

09. The check revealed no evidence of any problems or defects. See Hyster's Statement at 2.

10. At approximately eleven o'clock in the morning of July 7, 1994, plaintiff was using the truck to lift two rolls of paper when the truck overturned and pinned his right foot to

the ground. See Hyster's Statement at 3 and Plaintiff's Statement at 2.[14]

11. His right foot, and the part of his right leg just below his knee, were subsequently amputated as a result of the accident. See Plaintiff's Statement at 2.[15]

12. In August of 1995, plaintiff filed this lawsuit.

ALLEGATIONS. Plaintiff provide the following summary of his theory of the case and requested relief in his pre-trial conference information sheet filed in preparation of the trial in this case:

> The lift truck did not have a cage or guards around the operators compartment which would prevent the operator of said truck from being tossed from

---

[14]The parties disagree about the weight of the two rolls of paper. Plaintiff maintains that the rolls weighed 1200 pounds a piece; Hyster maintains that one roll weighed 2,162 pounds and the second roll weighed 2,076. If Hyster is believed, the load which plaintiff was attempting to carry exceeded the truck's rated load capacity by 788 pounds, or almost twenty-three percent. Although the Court is inclined to believe Hyster, given that it has built its assertion on the affidavit of an uninterested witness, Tommy Sebourn, the mechanic who performed the July 7, 1994, preventive maintenance check and who was present when the accident occurred, the Court need not resolve this dispute because its resolution does not affect the outcome of this lawsuit under the governing substantive law.

[15]His injuries occurred even though he was wearing a seat belt at the time of the accident. See Plaintiff's Statement at 1.

> the truck or his appendages being tossed outside the protective roll cage of the lift truck. Even though the plaintiff had his seatbelt on at the time of the accident, his right foot extended beyond the operators compartment of the lift truck when it overturned, . . .
>
> Plaintiff seeks damages for negligence and strict liability as a result of defendant manufacturer, Hyster's failure to adequately guard and protect the operator of this particular lift truck from injury.

See Pleading 40 at 1-2.

DR. FORBES. Plaintiff retained the services of Dr. R. Richard Forbes ("Forbes") as a expert witness. Hyster thereafter filed a motion in limine in which it asked the Court to prevent Forbes from testifying as an expert witness. Hyster maintained that Forbes was "not qualified by education or experience or training to testify about the design of the . . . truck . . . or the alleged existence of a defect. See Motion in Limine Brief at 1.[16] Thus, Hyster took the position that he

---

[16]Hyster specifically alleged that Dr. Forbes' expertise was in the area of thermal sciences, particularly heat transfer and fluid mechanics. Hyster noted that he had never designed a truck or any part of a truck, and had never published anything relating to trucks. In fact, there was no aspect of his experience, other than his general mechanical engineering background, which he contended

failed the preliminary assessment the Court is required to make. See Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993). Plaintiff understandably opposed the motion in limine.

The Court granted the motion in limine and barred Forbes from testifying as a expert. In doing so, the Court addressed a matter disputed by the parties, that is, whether a truck is comparable to a front-end loader or bobcat.[17] The Court adopted the explanation offered by Hyster and found that the truck was not comparable to a front-end loader or bobcat.[18]

---

had anything to do with trucks. See Motion in Limine Brief at 3-4.

[17]It was plaintiff's contention that because front-end loaders and bobcats had guards, and those vehicles were comparable to a truck, this truck should have had a guard.

[18]Clear evidence of the differences in these pieces of machinery is found within the classification of the machinery by the Society of Automotive Engineers (SAE). The SAE classifies lift trucks under the category entitled "Powered Industrial Trucks" while front-end loader[s] and bobcats are classified as "Earthmoving" or "General Purpose Industrial" machinery. (See SAE Categories of Off-Road Self-Propelled Work Machines -- SAE J1116 Hun 86, . . .) The justification for differing classifications flows from the recognition that lift trucks are designed for a different purpose and working environment than are front-end loaders or bobcats. Safety features which are necessary on a front-end loader may not be necessary or practical for a lift truck. (John E. Johnson Affidavit, . .) [Footnote omitted]. The differences between lift trucks and front-end loaders or bobcats were significant enough to warrant separate classification or regulatory purposes.

The Court concluded that whether a front-end loader or bobcat had the guard envisioned by Forbes was of no relevance to whether the ruck in this case should have had a guard.

The Court then inquired into whether plaintiff could make a submissible case to the jury without the benefit of Forbes' expert testimony. After reviewing the parties' various submissions, the Court determined that plaintiff could not make a submissible case. The Court now explains why.

ANALYSIS. This case is built upon two claims: negligence and strict liability. Obviously, the former requires proof that Hyster was negligent. See AMI 1012. Negligence is defined as the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under the circumstances similar to those shown by the evidence in this case. See AMI 301. Hyster is alleged to have been negligent in designing the truck because Hyster should have designed the truck with a guard or similar protective device on its lower right side. Under this theory, expert testimony is presented to show that the product was improperly designed. See Henry Woods and Beth Deere, Comparative Fault 14:3 (3rd ed. 1996).

The latter requires proof that the truck was defective. See Ark. Code Ann. 4-86-102; Lakeview Country Club, Inc., v.

Superior Products, --- Ark. ---, 926 S.W.2d 428 (1996).[19] The type of proof required was addressed by the Arkansas Supreme Court in Higgins v. General Motors Corp., 287 Ark. 382, 699 S.W.2d 741 (1985). In that case, the court stated:

> Proof of a specific defect is not required when common experience teaches the accident would not have occurred in the absence of a defect. The mere fact of an accident, standing alone, does not make out a case that the product is defective, but the addition of other facts tending to show the defect existed before the accident, may be sufficient. [Citation omitted].
>
> We note that under appropriate circumstances, a user's testimony alone may be sufficient evidence. [Citations omitted.

Id. at 743.

The burden of proving these claims rest with plaintiff. See Anselmo v. Tuck, 325 Ark. 211, 924 S.W.2d 798 (1996) (negligence); Nationwide Rentals Co., Inc. v. Carter, 298 Ark. 97, 765 S.W.2d 931 (1989) (strict liability). Can he carry the burden on these claims with the evidence he is prepared to

---

[19]It also requires proof that the defect rendered the truck unreasonably dangerous. See. Ark. Code Ann. 4-86-102.

offer on the truck's negligent or defective design? The Court thinks not. The only evidence of negligent or defective design he can produce is his own testimony.[20] The Court is not prepared to say that every litigant in a products liability case must present expert testimony to make a submissible case to the jury. As the decision in Higgins establishes, in an appropriate circumstance, a user's testimony alone may be adequate to carry the burden of proof. Plaintiff's problem is that this is not an appropriate circumstance. What is an appropriate circumstance? The Court is guided in that determination by the language from Pelster v. Ray, 987 F.2d 514, 526 (8th Cir. 1993):

> The test for determining the appropriateness of expert testimony is "the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment

---

[20]Hyster correctly notes that plaintiff has failed to support his assertion that Hyster had knowledge, or notice, of the truck's propensity to overturn. See Reply at 3. Without question, a truck can overturn; it happened in this instance. There does not appear, however, to be any evidence that this truck, or any truck designed and manufactured by Hyster, had a "propensity" to overturn if by the term he means a "natural inclination." In addition, this case is distinguishable from Anderson v. F.J. Little Machine Co., 68 F.3d 1113 (8th Cir. 1995), in that there is no evidence in this case that trucks designed and manufactured by other companies had the guard envisioned by plaintiff.

> from those having a specialized understanding of the subject involved in the dispute." Fed.R.Evid. 702 advisory committee's note.[21]

In this instance, the untrained layman would not be qualified to determine intelligently and to the best possible degree whether this truck was negligently designed or otherwise had a defect.

CONCLUSION. The material facts are not in dispute, and Hyster is entitled to judgment as a matter of law. Plaintiff cannot make a submissible case to the jury without the benefit of an expert's testimony. Thus, Hyster's motion for summary judgment is grant. Judgment will be entered for Hyster.

IT IS SO ORDERED this 10 day of December, 1996.

/s/ Henry Woods
HENRY WOODS, U.S. District Judge

---

[21]Although Pelster admittedly involved an instance in which the trial court erroneously admitted the testimony of an expert witness, the above-quoted language is equally applicable when the question is whether expert testimony is necessary to make a submissible case to the jury.

Supreme Court, U.S.
FILED
FEB 3 1998
CLERK

No. 97-1098

In The

Supreme Court of the United States

October Term, 1997

MICHAEL R. DANCY,

Petitioner,

vs.

HYSTER COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION ON BEHALF OF RESPONDENT HYSTER COMPANY

H. KEITH MORRISON
Counsel of Record
WRIGHT, LINDSEY & JENNINGS LLP
101 West Mountain Street,
Suite 206
Fayetteville, Arkansas 72701
(501) 575-0808
Attorneys for Respondent Hyster Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

RESPONDENT'S STATEMENT OF QUESTION PRESENTED

Should the analysis for determining whether expert testimony should be admitted under Rule 702 of the Federal Rules of Evidence mandated by this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1992), be restricted to scientific testimony?

LIST OF PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 29.6 Respondent states that its correct corporate name is NACCO Materials Handling Group, Inc., successor in interest by merger to Hyster Company d/b/a Hyster Company. The parent company of NACCO Materials Handling Group, Inc. is Hyster-Yale Materials Handling, Inc. In addition, Cascade Corporation and Liberty Mutual Insurance Company were previously parties to this proceeding.

TABLE OF CONTENTS

Page

RESPONDENT'S STATEMENT OF QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASON FOR DENYING THE WRIT 8

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378 (4th Cir. 1995) 9

Bogosian v. Mercedes-Benz of North America, 104 F.3d 472 (1st Cir. 1997) 16

Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir. 1996) 9, 10, 11

Cook v. American Steamship Company, 53 F.3d 733 (6th Cir. 1995) 16

Cummins v. Lyle Industries, 93 F.3d 362 (7th Cir. 1996) 16

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1992) ..... *passim*

Deimer v. Cincinnati Sub-Zero Products, Inc., 58 F.3d 341 (7th Cir. 1994) 16

Freeman v. Case Corp., 924 F. Supp. 1466 (W.D. Va. 1996) 9, 10, 13

Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923) 14

General Electric v. Joiner, (No. 96-188), ___ U.S. ___ (1997) 14

Peitzmeier v. Hennessy Indus., Inc. 97 F.3d 293 (8th Cir. 1996) 8, 16, 17

Pestel v. Vermeer Manufacturing Co., 64 F.3d 382 (8th Cir. 1995) 16, 17, 18

United States v. Lee, 25 F.3d 997 (11th Cir. 1994) 16

United States v. Rincon, 28 F.3d 921 (9th Cir. 1994) ..9, 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES:

Federal Rules of Evidence 702 ..... 8, 9, 13, 14, 15, 16

Supreme Court Rule 15.2 1

OTHER AUTHORITY:

Bert Black, *Winning the Expert Wars in the Age of Daubert*, SB16 ALI-ABA 13 (1996) 14

Christopher B. Mueller and Laird C. Kilpatrick, *Evidence* § 7.8 14

G. Michael Fenner, *The Daubert Handbook: The Case, its Essential Dilemma, and its Progeny*, 29 Creighton L. Rev. 939 (1996) 14

Moore's Federal Practice § 702.10 (Cum. Supp. 1995-96) 14

STATEMENT OF THE CASE

Petitioner Michael R. Dancy seeks issuance of a writ of certiorari following the affirmance of an adverse grant of summary judgment in his product liability suit against Respondent Hyster Company, a manufacturer of lift trucks. This Court is asked to consider whether its decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1992), should be restricted to what Petitioner refers to as "scientific testimony." Respondent requests that the Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 127 F.3d 649 (1997). *See also* Petition Appendix A.

Respondent respectfully suggests that misstatements of fact in the petition bear on the issues that would properly be before the Court if certiorari were granted.[1] Therefore, pursuant to the requirements of Supreme Court Rule 15.2, Respondent submits the following statement of the case.[2]

---

[1] Petitioner asserts that Respondent "had notice of the machines' propensity to tip over due to the nature of their use and prior tipover occurrences" (Petition at 3.), and "had been previously put on notice that similar accidents have occurred where the lift truck had tipped over laterally causing injury to the operator." (Petition at 3.) These unsupported assertions were expressly considered and rejected by the district court (Petition Appendix B at 36) and by the Court of Appeals for the Eighth Circuit. *Dancy v. Hyster*, 127 F.3d at 654. *See also* Petition Appendix A at 14-15.

[2] Respondent also incorporates by reference any additional background facts in the opinion below. *Dancy v. Hyster Company*, 127 F.3d 649, 649-52 (8th Cir. 1997). *See also* Petition Appendix A, at 2-3.

Respondent designs and manufactures lift trucks.[3] In March of 1988, Respondent manufactured a lift truck, which complied with all trade standards, safety standards, federal or state statutes or regulations, and delivered the lift truck to the Chase Bag Company in Monticello, Arkansas. Written safety warnings and operating instructions were provided in the Operating Manual that accompanied the lift truck. The lift truck was also equipped with warning labels that were attached to the lift truck when it was shipped. Chase Bag Company was later acquired by the Union Camp Corporation ("Union Camp"). The lift truck was used by Union Camp employees to clamp, lift and move heavy rolls of paper.

Petitioner began working for Union Camp in the spring of 1994, and eventually received training to operate the lift truck. Petitioner had been working for Union Camp for approximately four months at the time of his accident.

At approximately nine o'clock on the morning of July 7, 1994, a mechanic performed a preventive maintenance check on the lift truck. The check revealed no evidence of any problems or defects. Later that morning, the same mechanic witnessed Petitioner operating the lift truck in an unsafe manner. Specifically, Petitioner was grasping one roll of paper with the hydraulic grappler with a second roll perched on top of the first roll. Petitioner had overloaded the lift truck and was affecting its stability by carrying two paper rolls and by carrying the rolls while

---

[3] The vehicle has also been referred to by the parties as a forklift.

the mast and attachments of the lift truck were fully extended to their maximum height. The load was swaying and the mechanic informed Petitioner that what Petitioner was doing was dangerous.

At approximately eleven o'clock on the morning of July 7, 1994, Petitioner was again using the lift truck to lift two rolls of paper when the lift truck overturned. According to Petitioner the accident occurred when:

> [A]s I was sitting still on the clamp truck with my seatbelt intact, I began to raise a load of paper to stack them, and that's when the rear end came off the ground, and it tilted forward. And as soon as it started to tilt forward, that's when it fell to the right, and I immediately grabbed the steering wheel and held on and just had my legs down, pressed down on them as hard as I could and – from the fall. My legs went flying out.

When the lift truck tipped over onto its right side, Petitioner's right foot was pinned between the front right leg of the overhead guard of the lift truck and the concrete floor. Petitioner's right foot, and the part of his right leg just below his knee, were subsequently amputated as a result of the injuries he received in the accident.[4]

Petitioner commenced suit in state court against Hyster Company and Cascade Corporation, the manufacturer

---

[4] The parties disagreed as to whether the weight of the two rolls of paper being lifted at the time of his accident exceeded the specified lifting capacity of the lift truck. The lower courts did not resolve this factual dispute because its resolution did not affect the outcome of this lawsuit under the governing substantive law. *Dancy*, 127 F.3d at 650 n.2. *See also* Petition Appendix A at 2-3.

of the clamp. The case was removed to United States District Court for the Eastern District of Arkansas on diversity grounds.[5]

Petitioner retained Dr. Richard E. Forbes to serve as his expert in this matter in February of 1996. Dr. Forbes is a mechanical engineer on staff in the Mechanical Engineering Department at Mississippi State University. Dr. Forbes' specialty is in the area of thermal sciences, particularly heat transfer and fluid mechanics. Dr. Forbes has never designed a forklift or any of its components, has not been involved in the manufacturing of forklifts, and has not published anything relating to forklifts. There is no aspect of Dr. Forbes' experience, other than his general mechanical engineering background, which he contends has anything to do with forklifts.

Dr. Forbes' deposition was taken on August 26, 1996. During that deposition Dr. Forbes testified that the lift truck was defectively designed because of the absence of a guard or similar protective device on the lower right side of the lift truck. As of that date, Dr. Forbes had not designed a guard of the type he contended should have been present on the lift truck, and had not conducted tests or studies to determine whether or not the proposed guard was feasible or would be effective. Dr. Forbes also agreed that he had never seen a device such as the one he was proposing or one similar to it on a forklift.

Sometime after his deposition Dr. Forbes produced a "supplemental report" consisting of two written pages

---

[5] Cascade Corporation was voluntarily dismissed as a defendant in October of 1996.

and four attached photographs. In this report, Dr. Forbes expressed the opinion that "a permanently-located open-mesh guard on the right side of the lift truck would have prevented Dancy's injury." The language of the supplemental report confirmed that Dr. Forbes had still not actually designed, built or tested a guard of the type to which he was referring. (*Dancy*, 127 F.3d at 652; Petition Appendix A at 6.) No other evidence regarding Dr. Forbes' opinion was ever submitted.

After extensive discovery, Respondent filed a Motion in Limine in which it asked the district court to prevent Dr. Forbes from testifying as an expert witness. Respondent maintained that Dr. Forbes was "not qualified by education or experience or training" to testify about some non-specified type of guard on the lift truck. After the discovery cut-off Respondent also filed a Motion for Summary Judgment. The parties fully briefed the issues presented in the two motions, filed competing statements of fact, and submitted numerous exhibits, including affidavits, photographs and all or portions of five deposition transcripts.

The district court granted Respondent's Motion in Limine and barred Dr. Forbes from testifying as an expert. The district court found that the assessment of Dr. Forbes' testimony was governed by the analysis promulgated by this Court in *Daubert*, and that Dr. Forbes' testimony did not satisfy that standard. (Petition Appendix B at 24-26.)

In reaching its decision the district court first addressed and disposed of the question of whether a lift truck is comparable or similar to a front-end loader or

bobcat. It was Petitioner's contention that because front-end loaders and bobcats had guards, and those vehicles were "comparable" to a lift truck, the Respondent's lift truck should have had a guard.[6] Respondent presented contrasting evidence of the differences in these types of machinery within the classification of machinery by the Society of Automotive Engineers (SAE).[7] In addition, Respondent also submitted an expert's affidavit which explained that the justification for the differing classifications flows from a recognition that lift trucks are designed for a different purpose and working environment than are front-end loaders or bobcats. Safety features that are necessary on a front-end loader may not be necessary or practical for a lift truck. The affidavit also stated that no lift truck manufacturer has presently incorporated guards similar to those of front-end loaders and bobcats in the design of industrial lift trucks intended for use within a manufacturing facility.[8]

---

[6] This allegation was made in Petitioner's Brief in Support of Response to Motion in Limine and in his Brief in Support of Response to Motion for Summary Judgment. A comparison between lift trucks and bobcats or front-end loaders was *not* made by Dr. Forbes at his deposition or in his written response and was likewise not referenced in the Statement of Facts filed by Petitioner in response to Respondent's Motion for Summary Judgment.

[7] The SAE classifies lift trucks under a category entitled "Powered Industrial Trucks" while front-end loaders and bobcats are classified as "Earthmoving" or "General Purpose Industrial" machinery.

[8] The affidavit was not challenged or mentioned by Petitioner in his subsequent pleadings. Response in Opposition to Defendant's Motion for Summary Judgment, Statement of Facts, and Brief in Support of Plaintiff's Response to

After rejecting the notion that lift trucks are comparable to front-end loaders or bobcats, the district court applied *Daubert* to the remaining portions of Dr. Forbes' opinion. The district court considered the four *Daubert* factors and found that Forbes' theory could be, but had not been tested. Consequently, since he had not even attempted to build the proposed guard, Forbes' theory had not been subjected to peer review and publication, the known or potential rate of error could not be determined because Forbes' theory had never been tested, and the district court could not determine whether the theory had been "generally accepted." (Petition Appendix B at 26-27.)

After granting Respondent's Motion in Limine, the district court determined that Petitioner could not make a submissible case for the jury without Dr. Forbes' testimony and granted summary judgment in favor of Respondent.

Petitioner appealed the district court's rulings in favor of Respondent to the Court of Appeals for the Eighth Circuit. Petitioner argued that the district court had erred in applying the *Daubert* factors, which he contended only apply to "expert testimony [that] will rely on scientific principles or methods." *Dancy*, 127 F.3d at 652. *See also* Petition Appendix A at 7.

The Court of Appeals for the Eighth Circuit found Petitioner's argument unpersuasive, citing an earlier decision in which it had expressly rejected an identical

---

Defendant's Motion for Summary Judgment, all of which were filed with the district cout on November 15, 1996.

argument. *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996). Consequently, the Eighth Circuit held that the district court was correct in analyzing Dr. Forbes' testimony under the factors for reliability identified in *Daubert*. Based on these factors, the Court of Appeals for the Eighth Circuit concluded that the "district court was justified in questioning the reliability and usefulness of Dr. Forbes's testimony. Disallowing his testimony was not an abuse of discretion." *Dancy*, 127 F.3d at 652. *See also* Petition Appendix A at 7. The court then reviewed de novo the district court's grant of summary judgment, and concluded that without the aid of expert testimony Petitioner could not demonstrate the existence of a defect in the lift truck. Therefore, the entry of summary judgment was affirmed. *Dancy*, 127 F.3d at 652-55. *See also* Petition Appendix A at 8-15.

REASON FOR DENYING THE WRIT

Respondent submits the following arguments in support of its request for the denial of the petition for writ of certiorari. First, the excluded expert testimony was so lacking in reliability that exclusion would have been warranted under any interpretation of Rule 702 of the Federal Rules of Evidence. Therefore, the decision below is correct without regard to the question sought to be raised by the Petitioner. Second, the Court of Appeals was correct in affirming the district court's application of the analysis described in *Daubert* for determining the admissibility of expert testimony. Accordingly, since the expert testimony in this matter clearly fails to satisfy any of the factors identified in or relevant under *Daubert*, the district court

and the Court of Appeals for the Eighth Circuit correctly determined that the testimony was inadmissible.

A. Even if the analysis in Daubert were inapplicable to Dr. Forbes' testimony, his testimony would still be inadmissible because it fails to meet the basic requirement of reliability mandated by Rule 702.

Even if this Court were to hold that the analysis and factors outlined in *Daubert* did not apply to Dr. Forbes' testimony, his testimony would still fail to meet the remaining requirements for admissibility under Rule 702. As this Court stated in *Daubert*, the "overreaching subject" of Rule 702 focuses on "the evidentiary relevance and reliability" of proposed expert testimony. *Daubert*, 509 U.S. at 595. Even if the factors outlined by this Court in *Daubert* are not applied to a particular expert, at the very least, Rule 702 still requires a preliminary assessment that some standard of reliability has been met before that expert's testimony can be admitted.

The facts of this case clearly show that Dr. Forbes' proposed testimony does not rise to any imaginable standard of reliability. This point is illustrated by an examination of the four cases cited by Petitioner in support of his assertion that Dr. Forbes' testimony should be admissible under a different interpretation of Rule 702. (Petition at 6.)

Petitioner cites *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996); *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378 (4th Cir. 1995); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994); and *Freeman v. Case Corp.*, 924 F. Supp.

1466 (W.D. Va. 1996)[9] in support of his argument that *Daubert* should be limited solely to "scientific evidence." (Petition at 6.) However, the analysis employed in these cases, even if persuasive to this Court, would not require the reversal of the judgment here.

As a threshold matter, the Petitioner's reliance upon *Rincon* and *Benedi* is misplaced. (Petition at 6-7.) The Ninth Circuit's decision in *Rincon* did not turn on a distinction between "scientific" and "technical" evidence. The only reference in *Rincon* even tangentially related to this issue was in a footnote in which the Ninth Circuit merely referenced this Court's acknowledgement in *Daubert* that the evidence before it was "scientific" evidence rather than technical evidence or other areas of specialized knowledge which are also covered by Rule 702. *Rincon*, 28 F.3d at 923, n.3. Similarly, the *Benedi* case does not even address the issue underlying Petitioner's argument herein. The Fourth Circuit in *Benedi* did frame its *Daubert* analysis in terms of "scientific knowledge." *Benedi*, 66 F.3d at 1383. However, neither that court's substantive discussion nor its decision hinged upon any alleged distinction under Rule 702 in the admissibility requirements for scientific versus technical evidence.

Respondent agrees that the Tenth Circuit in *Compton* and the Fourth Circuit in *Freeman* decided not to apply the factors laid out by this Court in *Daubert* to expert testimony which those courts characterized as "based

---

[9] Petitioner has cited the district court case. However, this case has recently been affirmed by the Court of Appeals for the Fourth Circuit in *Freeman v. Case Corporation*, 118 F.3d 1011 (4th Cir. 1997).

solely upon experience or training" as opposed to being based on "any particular methodology or technique." *Compton*, 82 F.3d at 1519. However, neither of those cases stand for the proposition that "nonscientific" evidence is *per se* admissible or otherwise not subject to Rule 702 analysis. Therefore, the resolution of the conflict asserted by Petitioner is irrelevant and unnecessary to the ultimate resolution of this case.

For example, in *Compton* the court acknowledged that even in the absence of the *Daubert* factors, the offered expert testimony must still be "both relevant and reliable." *Compton*, 82 F.3d at 1519. A review of the facts of *Compton* make it understandable how that court could have reached its determination that the expert testimony involved in that case was "both relevant and reliable." In *Compton*, the court was reviewing the proposed testimony of an aerospace and mechanical engineer regarding alleged defects in the design of an automobile roof. *Id.* at 1513-19.[10] Based on his extensive research and personal

---

[10] The opinion reveals the following facts weighing in favor of the reliability of the expert's testimony: (1) the expert had personally inspected the accident vehicle; (2) the expert had personally inspected an identical undamaged vehicle; (3) the expert reviewed proposed manufacturer standards pertaining to headroom after roof crush; (4) the expert reviewed technical papers containing information about an experimental safety vehicle; (5) the expert reviewed proposed federal standards regarding headroom after roof crush; (6) the expert reviewed a paper presented by the Society of American Automotive Engineers discussing the advantages of roof crush as an energy-absorbing device for seat-belted occupants; and (7) the expert reviewed an SAE paper entitled "Field Studies of Rollover Performance." *Id.*

inspections, the expert then offered detailed and specific testimony regarding his opinion that the roof of the automobile was designed defectively. Specifically, he testified that

> [H]e would design the vehicle to allow only 2 to 3 inches of roof crush. He also explained crush should be limited to ensure 33 inches of remaining headroom after an accident occurring at a speed of 50 m.p.h. Under this standard the roof of the vehicle would be required to sustain average forces of between 48,000 and 71,000 pounds.

Id. at 1516.

Similarly, the testimony admitted in the *Freeman* case could also arguably meet the "relevant and reliable" standard required for admissibility under Rule 702 even in the absence of a more formal application of the *Daubert* factors. The district court's opinion in *Freeman* recites the following description of the basis for the expert's testimony in that case:

> [I]n preparation for his testimony, he reviewed extensive trade literature and notes pertaining to the design of the Case 1130 and of other tractors of varying sizes and configurations, the design of tractors generally, trade journals, accident statistics, industry and military specifications, and other assorted materials . . . Reed inspected the tractor that injured Freeman, and performed "tests" on it by manipulating various controls, operating the tractor while attempting to recreate the sudden forward movement described by Freeman, and placing his foot on the brake and SRC pedals to test his theory that both could be engaged simultaneously.

Freeman v. Case Corp., 924 F. Supp. 1456, 1462-63 (W.D. Va. 1996).

Compared to that found in *Compton* and *Freeman*, the foundation of Dr. Forbes' testimony in the present matter is quite unreliable. While Dr. Forbes is a mechanical engineer, his specialty is in the area of thermal sciences. Moreover, Dr. Forbes admitted that he had never designed a forklift or any of its components. Although Dr. Forbes did inspect the lift truck involved in the accident, he readily admits that he has never seen a lift truck installed with a "guard" similar to the one he proposes. In addition, while Dr. Forbes did review OSHA and ANSI standards generally applicable to lift trucks, as well as the owner's manual for this lift truck and reports containing general statistics regarding lift truck accidents, none of these documents contained any information or discussion regarding the need, feasibility, design or possible effectiveness of the theoretical "guard" which is at the center of Dr. Forbes' testimony.

Finally, Dr. Forbes' opinion certainly fails to rise to the level of specificity necessary to afford it any measure of evidentiary reliability. Not only has Dr. Forbes never designed or seen a guard of the type he proposes should have been installed on this lift truck, but he also failed to come forth with any specific information regarding the proper location, dimensions and materials for his proposed guard. Accordingly, Respondent submits that Dr. Forbes' testimony is not sufficiently reliable to allow admission under Rule 702 even under a more relaxed approach to expert testimony than has been followed in the Eighth Circuit. Certainly, given the questionable reliability of Dr. Forbes' testimony, the district court

clearly did not abuse its discretion in excluding this evidence. *General Electric v. Joiner,* (No. 96-188) ___ U.S. ___ (1997).

B. The district court's analysis of the proffered expert testimony as affirmed by the Eighth Circuit is completely consistent with Daubert.

This Court's decision in *Daubert* marked a significant shift in the analysis of expert testimony under Rule 702 of the Federal Rules of Evidence. The Court recognized an abandonment of the "general acceptance" test of *Frye v. U.S.,* 293 F. 1013 (D.C. Cir. 1923), and replaced it with an examination into the underpinnings of the expert's testimony to determine if there is sufficient indicia of validity and reliability.[11]

In *Daubert* this Court explained the proper analysis for determining the admissibility of expert testimony under Rule 702. The Court stated that as the gatekeeper of expert testimony, the trial judge "must ensure that any and all scientific testimony or evidence as admitted is not only relevant but reliable." *Daubert,* 509 U.S. at 589.

Petitioner places extreme emphasis upon this Court's use of the word "scientific" throughout its opinion and attempts to deduce therefrom that Dr. Forbes' testimony,

---

[11] *See* 11 *Moore's Federal Practice* § 702.10 (Cum. Supp. 1995-96); Christopher B. Mueller and Laird C. Kilpatrick, *Evidence* § 7.8; G. Michael Fenner, *The Daubert Handbook: The Case, its Essential Dilemma, and its Progeny,* 29 Creighton L. Rev. 939, 966, (1996); Bert Black, *Winning the Expert Wars in the Age of Daubert,* SB16 ALI-ABA 13 (1996).

which it characterizes as "technical" in nature, is exempt from *Daubert*'s requirements. Such a narrow reading of *Daubert* ignores the further guidance provided by this Court in that decision.

The Court described "scientific methodology," which by definition is the foundation for "scientific" testimony, as "based on generating hypotheses and testing them to see if they can be falsified . . . " *Id.* at 593. Dr. Forbes' testimony comes within this definition. In fact, his entire testimony was premised upon his hypothesis that the installation of a guard on the lift truck could have prevented Petitioner's injuries. Petitioner's attempt to label Dr. Forbes' testimony as purely "technical" is at odds with the language in *Daubert*. Therefore, even if there is a legitimate question as to whether *Daubert* applies to purely technical evidence, it cannot be resolved in this case, and presents no support for granting the writ of certiorari here.

Moreover, this Court's analysis in *Daubert* is properly applied to Dr. Forbes' testimony even if the petitioner is accurate in his characterization of this evidence as "technical." Petitioner contends that this Court expressly limited its *Daubert* analysis to cases involving "scientific" evidence. (Petition at 7.) The Petitioner references footnote 8 of the *Daubert* opinion to support this contention. Footnote 8 provides in full:

> Rule 702 also applies to "technical or other specialized knowledge." Our discussion is limited to the scientific context because that is the nature of the expertise offered here.

Contrary to Petitioner's assertion, a straightforward interpretation of this quoted footnote is that this Court was merely acknowledging the nature of the evidence before it and not placing a limitation on the applicability of its decision. In fact, this footnote simply reconfirms that Rule 702, which formed the underlying basis for this Court's analysis in *Daubert*, governs both scientific and technical evidence. Consequently, it logically follows that *Daubert* applies equally to all expert testimony covered by Rule 702 regardless of its characterization. A majority of the Courts of Appeals have so held. *See, e.g., Bogosian v. Mercedes-Benz of North America*, 104 F.3d 472 (1st Cir. 1997); *Cook v. American Steamship Company*, 53 F.3d 733 (6th Cir. 1995); *Cummins v. Lyle Industries*, 93 F.3d 362 (7th Cir. 1996); *Peitzmeier v. Hennessy Industries, Inc.*, 97 F.3d 293 (8th Cir. 1996); *Pestel v. Vermeer Manufacturing Co.*, 64 F.3d 382 (8th Cir. 1995); *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341 (7th Cir. 1994); and *United States v. Lee*, 25 F.3d 997 (11th Cir. 1994).

In *Daubert* this Court identified a nonexhaustive list of factors to assist in assessing the reliability and in turn admissibility of expert evidence under Rule 702. *Daubert*, 509 U.S. at 593-95. The Court also stated that "many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Id.* at 593. Accordingly, the Court of Appeals for the Eighth Circuit has incorporated various other factors into its *Daubert* analysis of expert testimony in the context of design defect cases. *See Peitzmeier*, 97 F.3d at 297; and *Pestel*, 64 F.3d at 284. The following chart compares those judicially recognized factors with the theory being promoted by Dr. Forbes in this matter.

Relevant Factors	*–Forbes' Theory*
Whether the hypothesis can be (and has been) tested. (*Daubert*, 113 S.Ct. at 2796-97; *Peitzmeier*, 97 F.3d at 297; *Pestel*, 64 F.3d at 384.)	Forbes' theory can be but has not been tested. (App. 233.)[12]
Whether the methodology has been subject to peer review and publication. (*Daubert*, 113 S.Ct. at 2797; *Peitzmeier*, 97 F.3d at 297; *Pestel*, 64 F.3d at 384.)	Forbes' theory has not been subject to any peer review and has not been included in any publication. (App. 233.)
Whether the methodology has been generally accepted in the community (*Daubert*, 113 S.Ct. at 2797; *Peitzmeier*, 97 F.3d at 298; *Pestel*, 64 F.3d at 384.)	Forbes' theory has not been accepted by *any* lift truck manufacturer. (App. 200, 233.)
Whether the expert was hired for trial purposes. (*Peitzmeier*, 97 F.3d at 297; *Pestel*, 64 F.3d at 383.)	Forbes was retained in 1996 for the sole purpose of this litigation. (App. 224.) Therefore, his theory was developed exclusively for litigation purposes.

---

[12] Respondent's references to "App." refer to the location of this information in the appendix produced below as the record for the Court of Appeals for the Eighth Circuit. Respondent recognizes that this Court does not have this appendix in its possession, but includes these references merely to avoid any questions regarding the accuracy of these statements.

Whether the concept has been used in its present state on the relevant machine. (*Pestel*, 64 F.3d at 384.)	Forbes' theory has never been used in its present state on a relevant model lift truck. (App. 233.)
Whether the design was finished, i.e. was the concept still "evolving". (*Pestel*, 64 F.3d at 384.)	Forbes has not even attempted to design a guard of the type he theorized about at his deposition. Therefore, the design has not been started, much less finished. (App. 233.)
What is the known or potential rate of error of the proffered theory. (*Daubert*, 113 S.Ct. at 2797; *Peitzmeier*, 97 F.3d at 298; *Pestel*, 64 F.3d at 384.)	Because Forbes' theory has never been tested, the known or potential rate of error cannot be determined. (App. 233.)

It is clear that Dr. Forbes' theory does not satisfy the test established by *Daubert* and applied in subsequent Eighth Circuit decisions. Dr. Forbes' hypothesis regarding the effectiveness of his undesigned and unfabricated guard fails each and every factor identified by this Court and the Eighth Circuit. Moreover, Dr. Forbes himself has tacitly admitted that he never even resolved such basic questions regarding his proposed guard such as where the guard should be located and the materials from which it should be constructed; and he has never considered the human factors issues relevant to the design of a guard.[13] Therefore, Respondent submits that the record fails to

---

[13] In his supplemental report, Dr. Forbes references where the guard "would be located", "typical" material, and human factors aspects that "would have to be included." (App. 19.)

sustain any alleged misapplication of *Daubert* by the courts below. The very uniqueness of the facts of this case suggests that review by this Court is neither necessary nor warranted.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

H. KEITH MORRISON
WRIGHT, LINDSEY & JENNINGS LLP
101 West Mountain Street,
Suite 206
Fayetteville, Arkansas 72701
(501) 575-0808

Counsel for Respondent